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ABSTRACT

Recent social scientific interest in juror selection has advanced the "voir dire" (jury selection) process beyond Clarence Darrow's formula for choosing a jury likely to be sympathetic to his client. From a communication perspective, generalization to different cases in different sections of the country and under different conditions suggests inferential caution. Each situation contains a unique combination of variables: the crime, victim, defendant, geographic region, and jury composition. Research on mock jury deliberations, the repeated use of mock juries by plaintiff lawyers to prepare for an antitrust case, and the admitted importance of the deliberation process in the trial of John Mitchell and Maurice Stans lead to the same conclusion. "Voir dire" selects the cast for the drama staged in the deliberation room, but neither the prosecution nor the defense counsels can write the script of that drama. "Voir dire" identifies who will enter the deliberation room. Social science techniques and the lawyer's experience can reveal what attitudes jurors take with them, but it is the deliberation process itself that remains the crucial element. (RL)

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THE IMPACT OF VOIR DIRE AND THE DELIBERATION PROCESS ON JURY VERDICTS

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THE IMPACT OF VOIR DIRE AND THE DELIBERATION PROCESS ON JURY VERDICTS

The relationship between voir dire and the deliberation process is important and obvious. Attorneys for the prosecution and the defense select those persons from the jury venire who will determine the final verdict. Yet the precise role each member of the jury will play in the deliberation process defies specification. At best, voir dire requires a combination of probability sampling, intuition and blind luck. For during the course of the trial and until a verdict is rendered, a small group of former strangers develops a group history, discovers an identity, and interacts with one another to establish member roles and group structure. This dynamic process can be neither exactly predicted nor completely controlled.

Recent social scientific interest in juror selection has advanced the voir dire process beyond Clarence Darrow's formula for choosing a jury likely to be sympathetic to this client: "Prohibitionists, Presbyterians, Baptists, Scandinavians and the wealthy are apt to covict and are best avoided. Far more forgiving are Jews, agnostics, Irishmen and especially those who like to laugh."

From a communication perspective, generalization to different cases in different sections of the country and under different conditions suggests inferential caution. Each situation contains a unique combination of variables; the crime, victim, defendant, geographic region and jury composition.

For example, demographic surveys predicted women would be more sympathetic to the defendant in Harrisburgh, Pennsylvania and Camden, New Jersey trials but less friendly in Gainesville, Florida.[2]

Mills and Bohannon found race and the nature of the crime interacted with sex to influence womens' attitudes. In their study, 73% of the black female jurors reported an initial personal opinion of guilty toward the defendant. This figure compared with an initial opinion of guilty by white female jurors of 69%, 61% for white male jurors and 50% for black male jurors.[3] These researchers suggest that "victimization rates of the black female subgroup in large cities such as Baltimore may help to explain these findings."[4] Black females are the most frequent objects of assault and perceived the crime as less serious than did white females or either of the male groups in the sample.

The advocate traditionally has three specific objectives in voir dire. The screening of venire members should identify those individuals who are qualified to serve as jurors, those who hold attitudes, beliefs and values that may bias them for or against the defendant or the state and those whose background or experience may provide grounds for a peremptory challenge.

Suggs and Sales suggest two other judicially unacceptable voir dire purposes; ingratiation and indoctrination.[5] Webster tells us that to ingratiate means "to commend, to favor, be pleasantly persuasive." Now this may be judically unacceptable in voir dire but it is extremely important

to persuasion. Being positively disposed toward the speaker increases interpersonal attraction. When the receiver of the persuasive communication perceives a similarity with the sender of the message, the receiver of the persuasive communication perceives a similarity with the sender of the message, the receiver assumes that they share common goals and values. The theory states that the receiver (in this case the prospective juror) will alter his attitudes to bring them in line with those of the speaker.[6] (This phenomenon, by the way, is the basis for some of the criticism of social science research. It occurs in the social scientist's laboratory when subjects give a response the researcher is looking for, not because it is necessarily their true response, but because they like or want approval from the researcher.)

The point about ingratiation is that the process of persuasion does not begin with the lawyer's opening arguments. And while it may be judicially unacceptable" to win the favor of potential jurors during voir dire, it will be impossible to avoid creating some positive or negative impression of the speaker as a person whose credibility the jurors determine.

A second communication purpose that may begin with voir dire is indoctrination. Again the term has a negative connotation for many, but it is difficult, if not impossible, to avoid in voir dire.

In essence, the persuasive process begins before the jury is ever selected. It begins before the jurors even enter the courtroom. High publicity trials only push back the point in time when the elements of

persuasion begin. This occurs, of course, as the venire learns the particulars of the case through the media before prospective jurors have been called for jury duty!

Miami attorney Joel Hirschhorn holds the opinion that excessive publicity is not in the best interest of his client. He contends that pretrial and trial publicity interfere with the defendant's right to a fair and impartial trial. According to Hirschhorn: "The mere presence of television cameras is inherently prejudicial."[7]

Contrary views are held by many persons, especially those in the mass media. Directing his comments specifically to the impact of television coverage of trials, Norman Davis, Vice-President of WPLG TV, Miami found no evidence "to show that camera access has been incompatible with the right to due processes and a fair trial."[8] The U.S. Supreme Court agreed. In its unanimous decision of January 26, 1981 the court ruled that there isn't any evidence to conclude that cameras, by their mere presence, prevent fair trials.[9]

In December 1979, Raymond Buchanan, my colleague at the University of Central Florida; and I investigated public knowledge and attitudes about Theodore Bundy and the Kimberly Leach case. Bundy was scheduled to be tried early in 1980 for the murder of the 12-year-old Lake City girl. Our concern was not to assist with voir dire, but to assess exposure to the media, knowledge and attitudes about Bundy and the case and obtain related demographic information.

Our sample had high exposure to the Sentinel Star, the only local daily newspaper. Only 21% indicated they read the paper less than twice a week and 8% st .ted they did not read the Sentinel at all. Similar findings occurred for TV news programs. Over 90% watched local television news 3 or more times per week. Only 2% claimed to not watch television news at all.

One-third of the sample recognized the name Kimberly Leach. This compared with 98% who said they recognized the name of Ted Bundy. All six of the respondents who claimed not to recognize Bundy's name were female. This was a major finding in the survey. If your definition of what constitutes an impartial jury requires that jurors know nothing about the case or the defendant, more than 600 citizens would be required for the venire in this trial.

Another interesting finding of our survey concerned the relationship between prior convictions and present guilt. When respondents indicated that they knew Bundy had been found guilty of the Chi Omega Murders, they were then asked: Is this a strong indication that he committed another murder of which he is accused? Thirty-one percent indicated that yes, his prior conviction was a strong indication of guilt in another murder.

But when respondents who stated they had not followed the Bundy trial were asked hypothetically: "If a person were convicted of murder, in your opinion, is this a strong indication that he committed another of which he is accused?", only 15% believed that a prior conviction for

murder was a strong indication of guilt for another murder of which he is accused. Thus, when the defendant, Theodore Bundy, was specifically linked with prior convictions, twice as many respondents thought it was an indication of additional guilt as when the question was hypothetical.

The impact of cameras in the courtroom is of special interest to social scientists. Florida Public Television showed several summaries of the Miami Trial of Theodore Bundy during the summer of 1979. Our sample, taken six months later, indicated that 65% of the respondents either did not watch the trial summaries or could not remember watching them.

The Miami and Orlando trials of Ted Bundy are recent examples of how social scientists have been asked to join with attorneys to prepare cases for trial. Social Scientific techniques have thus far been applied in cases where the defendant could either afford the considerable expense of population sampling or where the pretrial publicity increased the likelihood of jurors having prejudicial attitudes. For example, New York media consultant Marty Herbst assisted the defense attorneys who selected the jurors who acquitted John Mitchell and Maurice Stans of conspiracy, obstruction of justice and perjury. The Mitchell-Stans trial, however, illustrates how social research data are used. Peter E. Flemming, Jr., John Mitchell's chief counsel, reported that the Herbst data only supported the judgments of the defense counsel. Flemming stated: "We could act with a greater degree of confidence."[10]

The Mitchell-Stans trial also exemplifies the uncontrolled nature of

the relationship between voir dire and the deliberation process. Post-trial interviews with Mitchell-Stans jurors indicated that the juror who was the primary influence for acquittal did not fit Mr. Herbst's profile. This juror was added as an alternate late in the selection process.[11]

The relatively few cases where sophisticated social science research techniques have been used to aid juror selection support an important conclusion drawn from communication theory. Voir dire identifies who will enter the deliberation room. Social science techniques and the lawyer's experience can reveal what attitudes jurors take with them. But it is the deliberation process itself that remains the crucial element. The MCI Communications Corporation antitrust suit against American Telephone and Telegraph Company provides a dramatic example. The headline in the September 1980 issue of the Chicago Lawyer read: MOCK JURIES HELP JENNER WIN $1.8 BILLION AT&T VERDICT FOR MCI. In his article about the case, James Tuohy reported that lawyers from the firm of Jenner & Block represented MCI and practiced their courtroom presentation on a series of mock juries. This use of mock juries was part of the most extensive jury research program ever undertaken in preparation for a trial. The project began almost two years before the case came to trial.

Mock juries were selected to be as similar as possible to the jury that eventually would try the case. Lawyers from the Jenner firm presented both sides of the case--some representing MCI and others representing AT&T. The objective was to learn how the actual jurors might

respond to certain points on both sides. After hearing the evidence, the mock jurors pondered their verdict. The Jenner attorneys observed the jury deliberations and, after a verdict was rendered, questioned the jurors concerning why certain arguments had failed to convince them while others had succeeded. The lawyers adjusted their arguments to reflect the juror reactions to the information from the previous trial and presented their revised case to a new group of mock jurors.[12]

When the case came to trial, the jury deliberated two days before finding AT&T guilty on 10 of 15 counts set forth in the MCI complaint. Only 12 hours was needed, however, for the jury to find that MCI suffered $600 million actual damages. Under the Sherman Antitrust Act, the figure was tripled. Thus, MCI was granted $1.8 billion in the largest such award in history. Under a contingent fee agreement, Jenner & Block received fees of nearly $100 million, the largest fee ever received by a single firm in any type of case.[13]

Leo Shapiro, head of the market research company that assisted the Jenner and Block firm, said he learned an important thing about juries during his research: "The argument that you can predict a jury's response by careful selection based on such things as religion, race, sex and so forth turns out to be bullshit. Surveys cannot test the kind of interaction that occurs between jurors when they are together. They are transformed as they talk. It comes out that at no time do you have a sure case."[14]

Data collected by a research team from the Institute for Study of the Trial at the University of Central Florida support the vital but elusive importance of jury deliberations. Between August 1977 and February 1978, five jury deliberations at the Titusville, Florida Court House were the subject of intense social scientific scrutiny. Several aspects of these deliberations made them noteworthy. First, the trials were presented on videotape. Second, the actual deliberations were recorded on audio tape. Finally, the project was supported by LEAA funding with special permission from the Florida Supreme Court.

Some background information may be helpful in interpreting our findings. All five juries were composed of actual members of jury venires and selected to be typical of the kind of jury that would consider such a case. The project was conducted at the conclusion of the jurors' service on jury duty. Although it was a mock trial, every effort was made to create the impression in the minds of the jury that this was an actual case being presented via videotape to expedite the case. The trial was the STATE vs. Johnson Walker, accused of breaking and entering with intent to commit a felony. Although the audio tape recording was made without the knowledge of the jurors, all gave permission to use the tapes for research purposes after the project was explained to them.

Previous research by Strodtbeck found higher than expected participation from males than females, higher than expected participation from Proprietor and Clerical occupational classes and lower than expected

participation from those in the Skilled and Unskilled labor categories. In all instances the selection of a foreman was quickly and casually accomplished.[15]

The results of the present investigation are consistent with those of Strodtbeck. A definite sex bias favored men as foremen. In the only jury where a woman served as foreman, the suggestion to elect a lady foreman came from a man.

Seating position has been shown to influence who is selected foreman.[16] This also proved to be true in the present study. One female juror observed: "You're at the head of the table, you should be foreman."

Procedural suggestions were extremely important to the course of the deliberation because when the suggestions were followed, they determined not only what would be discussed but in what order. Suggestions, however, were sometimes disadvantageous to the successful completion of the group task. Early in its deliberation, one jury decided to take a straw vote "to see how we all feel." The vote revealed a 5 to 1 split in the jury in favor of not guilty. This early vote identified the one person who was deviant from the majority view. It also reinforced his commitment to his belief and tended to lock him into a defensive position. Of the five juries in this investigation, the only jury unable to reach a unanimous decision deadlocked 5 to 1 in favor of not guilty after ninety minutes of deliberation, the same vote division revealed by the straw ballot taken 85 minutes earlier.

A second generalization came from this study. The juror's personal experience and knowledge of the world affect their evaluation of the

evidence and ultimately the verdict. The statements of fact presented during the trial raise questions about the case. If the answers are not funished by the evidence, answers are offered by the jurors consistent with their perception of how people would behave in similar or hypothetical situations. The jurors need closure, they want to explain the uncertain. Personal experience, background and knowledge of human nature help clarify disputed issues. One woman had a son involved in a marijuana case. She knew circumstances may make an innocent person appear guilty.

The frailty and potential for error in eyewitness testimony are well documented.[17] This investigation, however, found blatant errors in a juror's memory may go unchallenged by five other independent persons. In this mock trial, the crime occurred in the fictitious town of River City. During one deliberation, a female juror explained: "I live in Indian River City. I know right where that hardware store is." No other juror caught her mistake. Rather her knowledge and experience gave her added persuasive impact on her fellow jurors.

A third observation that can be made from the analyzed deliberations concerns the basis for determining defendant credibility. Obviously the jurors' perception of the credibility of the accused will be a crucial determinant of guilt or innocense. The deliberations used in this research raise two questions concerning the effect of taking the stand in one's own defense. On the one hand, vocal and visual cues may cause the jurors to see the accused as anxious, deceptive and guilty.[18] The force

of the nonverbal message on the perception of credibility emphasizes the many factors other than the evidence in the case that can and do affect the jury. Other jurors, however, expressed the belief that the defendant would never take the stand if he were guilty. One juror asserted that knowledge of a prior conviction strongly supported the likelihood of guilt in the present case.[19] This observation was balanced by a female juror who stated that she would be less inclined to convict if she knew of a prior conviction.

These instances of jurors seeing a defendant as high or low in credibility reveals their tendency to generalize ("Most colored people carry a weapon."), empathize ("If I were a black boy, I'd run too.").and sympathize ("If he is innocent and we find him guilty, it will destroy him.").

The five examples of jury deliberations used in the present study suggest that straw votes and secret ballots are difficult, if not impossible, to conduct. In each of the deliberations the initial vote was 5 to 1 in favor of not guilty. The single dissenter quickly admitted her or his position and defended it against the persuasive attempts of the remaining jurors. After the deviate member was identified, the communication was directed to that person in an effort to change her or his mind.[20] At times all communication ceased. The jurors either could think of no additional arguments or the persuasive responsibility passed to another juror. Statements directed to the dissenting juror were characterized by extreme politeness, frequent acknowledgement of the individual's right to her or his own opinion and references to the judge's instructions when the basis for the minority view contradicted the jury's charge.

One of the five juries deadlocked after 90 minutes of deliberation. The remaining juries reached consensus approximately 30 minutes after the initial vote was taken. After consensus, the mood lightened, joking and laughter could be heard for the first time and all expressed relief that they had reached agreement.

The mock jury deliberations of the Florida research, the repeated use of mock juries in the MCI anti-trust case against AT&T and the admitted importance of the deliberation process in the Mitchell-Stans trial lead to the same conclusion. Voir dire selects the cast for the drama staged in the deliberation room. But neither the prosecution nor the defense counsels write the script. The jury, working together, creates the unique group dynamic that can be influenced but never controlled.

FOOTNOTES

[1]James Kahn, "Picking Peers: Social Scientists' Role in Selection of Juries Sparks Legal Debate," Wall Street Journal, Aug. 12, 1974, p.1.

[2]Kahn, p. 1.

[3]Carol J. Mills and Wayne E. Bohannon, "Juror Characteristics: To What Extent Are They Related to Jury Verdicts?" Judicature, 64 (1980), 27.

[4]Mills and Bohannon, 27.

[5]David Suggs and Bruce D. Sales, "The Art and Science of Conducting the Voir Dire," Professional Psychology, 9 (1978), 371.

[6]Donn Byrne, "Interpersonal Attraction and Attitude Similarity," Journal of Abnormal and Social Psychology, 62 (1961), 713-715.

[7]Judicature, 64 (1980), 145.

[8]Norman Davis, "Television in Our Courts: The Proven Advantages, the Unproven Danger," Judicature, 64 (1980), 86.

[9]Wall Street Journal, January 27, 1981, p. 4.

[10]Kahn, p. 19.

[11]Kahn, p. 19.

[12]Chicago Lawyer, September, 1980, p. 1.

[13]Chicago Lawyers, p. 11.

[14]Chicago Lawyer, p. 11.

[15]Fred L. Strodtbeck, Rita M. James, and Charles Hawkins, "Social Status in Jury Deliberation," American Sociological Review, 22 (1957), 715.

[16]A. Paul Hare and Robert F. Bales, "Seating Position and Small Group Interaction," Sociometry, 26 (1963), 480-486.

[17]Elizabeth F. Loftus, Eyewitness Testimony (Cambridge, Mass: Harvard University Press, 1979); A. Daniel Yarmey, The Psychology of Eyewitness Testimony (New York: The Free Press, 1979).

[18]Paul Ekman and Wallace Friesen, "Nonverbal Leakage and Clues to Deception," Psychiatry 32 (1969), 88-106; Mark L. Knapp and Mark E. Comadena, "Telling It Like It Isn't: A Review of Theory and Research on Deceptive Communications," Human Communication Research, 5 (1979), 270-285; David R. Brandt, Gerald R. Miller and John E. Hocking, "The Truth-Deception Alttribution: Effects of Familiarity on the Ability of Observers to Detect Deception," Human Communication Research, 6 (1980), 99-110.

[19]This finding was noted earlier in respondent attitudes toward the presumed guilt of Theodore Bundy.

[20]Stanley Schachter, "Deviation, Rejection, and Communication," Journal of Abnormal and Social Psychology," 46 (1951), 190-207.